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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

L. & L. HOWELL, INC., *Petitioner*,
v.
CINCINNATI COOPERATIVE MILK
SALES ASSOCIATION
and
MIAMI VALLEY MILK PRODUCERS
ASSOCIATION, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the Capper-Volstead exemption from the antitrust laws permits agricultural cooperatives to use lawfully acquired monopoly power to set at below realistic variable costs the prices for handling services they will pay to third-party handlers that are dependent upon access to the monopolized product.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	8
APPENDIX:	
Opinion of the United States Court of Appeals for the Sixth Circuit, rendered and entered as "Order" on July 20, 1983	1a
Opinion of the United States District Court for the Southern District of Ohio, Western Division, entered as "Order Denying Defendant Motions for a New Trial and for Judgment Non Obstante Verdicto" on July 10, 1981	11a
Judgment of the United States District Court for the Southern District of Ohio, Western Division, entered on May 20, 1981	15a
Jury Verdict with Answered Interrogatories returned and entered in the United States District Court for the Southern District of Ohio, Western Division, on April 24, 1981	16a
Order entitled "Judgment" of the United States District Court for the Southern District of Ohio, Western Division, denying defendant cooperatives' motions for new trial and for judgment non obstante verdicto, entered on July 10, 1981	19a
Order of the United States Court of Appeals for the Sixth Circuit, denying petition for rehearing, entered October 4, 1983	20a
Clayton Act, § 4, 15 U.S.C. § 15	21a
Sherman Act, § 1, 15 U.S.C. § 1, as it existed immediately prior to the December 21, 1971 amendment thereof	21a

Table of Contents Continued

Page

Sherman Act, § 1, 15 U.S.C. § 1, as amended on December 21, 1974 ..... 22a

Sherman Act, § 2, 15 U.S.C. § 2, as it existed immediately prior to the December 21, 1974 amendment thereof 22a

Sherman Act, § 2, 15 U.S.C. § 2, as amended on December 21, 1974 ..... 23a

Excerpt from the August 26, 1983 issue of "MMI Membership Pipeline" 24a

TABLE OF AUTHORITIES

CASES: Page

FMC v. *Seatrain Lines, Inc.*, 411 U.S. 726, 93 S.Ct 1773, 36 L.Ed.2d 620 (1973) 8

Mandeville Island Farms, Inc. v. *American Crystal Sugar Company*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948) 6

Maryland and Virginia Milk Producers Association v. *United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880, (1960) 7

Union Labor Life Ins. Co. v. *Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982) 8

United States v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956) 8

STATUTES:

Capper-Volstead Act, § 1, 7 U.S.C. § 291, Feb. 18, 1922, c. 57, § 1, 42 Stat. 388 ..... *passim*

Clayton Act, Section 4, 15 U.S.C. § 15 ..... 2, 3, 6

Sherman Act, Section 1, 15 U.S.C. § 1 2

Sherman Act, Section 2, 15 U.S.C. § 2 2

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ASSOCIATION, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, L. & L. Howell, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 20, 1983. Petitioner has no parent companies, subsidiaries or affiliates.

OPINIONS BELOW

Neither the decision of the District Court (11a, *infra*), nor the decision of the Court of Appeals (1a, *infra*), is reported.

JURISDICTION

The judgment of the Court of Appeals was rendered and entered on July 20, 1983. A timely petition for rehearing was denied on October 4, 1983. On December 23, 1983,

Justice O'Connor granted an extension of time for the filing of this petition to and including February 1, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of the Capper-Volstead Act, Section 1 (7 U.S.C. § 291), as it relates to a private enforcement antitrust action involving the Sherman Act, Sections 1 and 2 (15 U.S.C. §§ 1 and 2), and the Clayton Act, Section 4 (15 U.S.C. § 15). Said antitrust statutes are set forth at 21a-23a, *infra*. Capper-Volstead, Section 1 (7 U.S.C. § 291) provides:

> **Capper-Volstead Act, § 1, 7 U.S.C. § 291,** Feb. 18, 1922,
>
> c. 57, § 1, 42 Stat. 388.
>
> § 291. Authorization of associations; powers
>
> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, diarymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

STATEMENT OF THE CASE

This is an appeal from the judgment of the Sixth Circuit Court of Appeals reversing the District Court's judgment in favor of L. & L. Howell, Inc. against the defendant milk cooperatives, Cincinnati Cooperative Milk Sales Association and Miami Valley Milk Producers Association, for treble damages under the antitrust laws. The court of first instance is the United States District Court for the Southern District of Ohio, Western Division. Section 4 of the Clayton Act (15 U.S.C. § 15), is the basis of its jurisdiction.

L. & L. Howell, Inc. is a closely held (father and son) corporation, engaged in hauling of milk from farms to dairies from its base in Greenville, Ohio. From 1972 to 1976, it operated primarily within a thirty mile radius of its reload station in Greenville, covering eleven counties in Ohio and Indiana.

The two cooperatives were competing marketing associations of producers qualified by the Department of Agriculture under the Capper-Volstead Act (7 U.S.C. § 291), and had monopoly control of the milk coming from the Greenville area, controlling 84.6% in 1972, 82.6% in 1973, 80.0% in 1974, 80.8% in 1975 and 79.8% in 1976 (Tr. 152).[1]

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[1] "Tr." refers to the trial transcript, being volumes C and D of the transcript of proceedings.

In early 1972 about 50% of the milk hauled by Howell was being transported directly by farm truck to Westerville Creamery, Covington, Ohio, about twenty-eight miles from Greenville, and about 50% was being transported in over-the-road equipment to the Meadowgold Dairy, Dayton, Ohio, about thirty-five miles from Greenville (Tr. 5-6).

While Howell hauled milk for both cooperatives, if a farmer was a member of one and the farmer next door was a member of the other, Howell had to send a different truck to each farm as a result of each cooperative's policy of not permitting a milk hauler to commingle milk of one cooperative with that of another (Tr. 7). A hauler could mix the milk of a farmer that did not belong to any cooperative with that of either cooperative, just not the milk of another cooperative (Tr. 7).

In May, 1972, a change was jointly instigated by the two cooperatives. They needed a hauler to replace other haulers in hauling milk to Kroger's processing plant near Cincinnati, about eighty-two miles from Greenville. The incentive they jointly offered to Howell for changing to a destination which more than doubled the miles to be traveled from its Greenville reload station, was their permitting commingling of their respective members' milk into a single pick-up route, plus an increase in rate of 5¢ per hundredweight (cwt.), from 33¢ to 38¢ (Tr. 7-10). Howell agreed to the change on a trial basis. However, it soon realized that any saving from commingling plus the additional 5¢, did not cover its increased variable costs (Tr. 10-11). The rate increase provided only about enough to cover just the entailed additional operation of the reload function from farm pickup truck to over-the-road rig (Tr. 215-216, 226-227, 236-239). It did not cover the additional cost of either the driver time, fuel, or equipment

wear and tear necessarily involved to make the daily round trip over-the-road run of one hundred sixty-four miles. (The reasonable cost of driver time alone in 1972 was 15¢ per cwt.) (Tr. 11, 142-145).

Howell pointed this problem out to the cooperatives within a couple of months of the change (Tr. 11). The cooperatives repeatedly and adamantly refused to reconsider (Tr. 11-13, 17, 21-22, 119, Pltf. Ex. 52). Howell's president summarized their responses thusly:

> "Usually, I got put off. They would say they didn't have the money. They needed the milk at Kroger's. No way they were going to pay our bill. They didn't send another hauler down because they had no others in the area that could do the job as efficiently as we could or even had the equipment to do the job we did. Numerous reasons that they wouldn't let us take our milk back to Covington or in Dayton like we were, or send us somewhere closer, being as we said we couldn't afford to haul it to Kroger's for the five cents, and that we never realized a savings in the fact that we put the milk together, and I don't know if I covered it all or not. This was a lot of communications at that time." (Tr. 22).

This left Howell in the position which the trial judge described in conference, as follows:

> "You [the cooperatives] are acting for the producers and if Mr. Saul is right, if you have a coercive power by reason of your size, the realities are Mr. Howell will either haul on your terms or he won't haul, period. It's just that simple. It's nobody else that he can deal with, if you have 100 per cent of the farmers." (Tr. 414).

The jury found Howell to have been damaged thereby in the compensatory damages sum of $136,000 for the four

years ended mid-1976.[2] In accordance with Section 4 of the Clayton Act (15 U.S.C. § 15), judgment was entered for the trebled sum of $408,000. The Court of Appeals reversed and remanded for dismissal, on the basis that the challenged conduct was permitted by the cooperatives' Capper-Volstead exemption.

The Court of Appeals has determined, as a matter of law, that the setting by Capper-Volstead milk producer cooperatives possessed of lawfully acquired monopoly power of a third-party dependent milk hauler's rate at less than such hauler's necessarily entailed variable costs, would constitute a lawful use of that monopoly power, because under their Capper-Volstead exemption milk producers and their cooperative associations have the right to make as favorable terms as they can for hauling services.

REASONS FOR GRANTING THE WRIT

The decision below raises this question of fundamental importance in the matter of ever-burgeoning agricultural cooperatives: Whether those cooperatives that have lawfully acquired monopoly power under the protection of their Capper-Volstead exemption, are permitted and protected by that exemption to exact handling services at prices below the realistic variable costs thereof from third-party handlers who are dependent upon access to the monopolized product.

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[2] Howell elected to continue the relationship under the challenged arrangement, and to seek his redress by this litigation. In this regard, see *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company*, 334 U.S. 219, 223, 68 S.Ct. 996, 1000, 92 L.Ed. 1328, 1333 (1948): " . . . [T]hey had the choice of either signing or abandoning sugar beet farming."

To permit the overly broad interpretation that the Capper-Volstead exemption affords license for cooperatives to use privileged monopoly power to exact manifestly below cost prices from dependent suppliers of services or goods, inevitably invites proliferation of unbridled use of monopoly power by the gamut of agricultural cooperatives marketing myriad products. The danger of such proliferation among farmer producers and their cooperative associations is very real. Indeed, the propensity of today's farmer to keep his ear to the ground, ever listening for additional profit opportunities, is essential to his economic survival.

Such license and its underlying proposition that "producers and their cooperative associations have the right to make as favorable terms as they can for hauling services" (24a, *infra*),[3] countenance the economic peril of involuntary subsidization of agricultural cooperatives by the multitude of suppliers for whom such privileged monopolists necessarily comprise the only market.

This overly broad interpretation constitutes an intolerable frustration of the purpose of the Capper-Volstead exemption which was to give farmers the opportunity to compete as entities in the same fashion as business corporations, *Maryland and Virginia Milk Producers Association* v. *United States*, 362 U.S. 458, 463-467, 80 S.Ct. 847, 851-854, 4 L.Ed.2d 880, 885-888 (1960), and not as a license for such exaction of involuntary subsidiza-

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[3] This is the essence of the subject opinion of the Court of Appeals as perceived by Milk Marketing, Inc. (the acquirer by merger of numerous milk producer cooperatives, including both respondents), in the August 26, 1983 issue of "MMI Membership Pipeline," a trade publication to its members. (24a, *infra*).

tion from those that necessarily must deal with such monopoly-privileged cooperatives. *Id.*

Lastly, the overly broad interpretation of the Capper-Volstead exemption which inheres in the opinion of the Court of Appeals, plainly defies the fundamental precept that exemptions from the antitrust laws must be narrowly construed. *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733, 93 S.Ct. 1773, 1778, 36 L.Ed.2d 620, 626 (1973); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 943, 100 L.Ed. 1209, 1218 (1956); *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 126, 102 S.Ct. 3002, 3007, 73 L.Ed.2d 647, 654 (1982).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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NOS. 81-3491/3492

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L. & L. HOWELL, INC.,
Plaintiff-Appellee,

v.

CINCINNATI COOPERATIVE MILK SALES ASSOCIATION, *et al.*,
Defendants-Appellants.

FILED
JUL 20 1983
JOHN P. HEHMAN, Clerk

ORDER

Before: JONES and WELLFORD, Circuit Judges, and ALLEN, District Judge*

The defendants in this appeal, two dairy cooperatives, seek review of the district court's entry of judgment against them on a claim by a milk hauler for violation of Section 1 of the Sherman Antitrust Act. They assert that their actions in contracting with the plaintiff milk hauler, even if alleged to be at an unreasonably low "predatory" price, were exempt from

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*Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

antitrust liability under the Capper-Volstead exemption, and they seek reversal of the judgment below rendered for plaintiff. We find that the district court erred in failing to direct a verdict in favor of the defendant cooperatives under the circumstances made clear at the conclusion of the proof.

Plaintiff, L. & L. Howell, Inc. (Howell), is a closely held corporation engaged in milk hauling and based in Greenville, Ohio. Howell picks up milk from the farms of milk producers and delivers it to designated buyer dairy processors. The members of the defendant dairy cooperatives are the farmers from whom Howell picks up milk. Howell hauled milk for both of the defendant cooperatives, Miami Valley Milk Producers Association (Miami Valley) and the Cincinnati Cooperative Milk Sales Association (Cincinnati Cooperatives). During the period in question, 80%-85% of the farmers in the area in which plaintiff Howell hauled milk were members of one of the defendant cooperatives. The defendants were competitor cooperatives, who combined to seek more favorable rates for the milk produced by their members.

Prior to May, 1972, Howell picked up milk from the farms of members of the Cincinnati Cooperative and delivered it to the Westernville Creamery in Covington, Ohio. Howell also picked up milk from members of the Miami Valley and hauled it to Dayton, Ohio. Since the milk for each cooperative was to go to different locations, each cooperative had a policy of not permitting a milk hauler to commingle milk collected from members of one cooperative with the milk of members from another cooperative. Plaintiff Howell was therefore required to send different trucks to the members of each cooperative to gather milk in the same general geographic area, but there was no combination or concert of action to bring about this result.

In May, 1972, both defendant cooperatives decided to make a common arrangement to transport their milk from the area previously served by Howell to a common customer, Kroger's processing plant near Cincinnati. They arranged a meeting with plaintiff Howell to discuss this new plan of operation. In this meeting they jointly proposed that Howell stop hauling

milk to Covington and Dayton and begin to haul milk to Kroger's processing plant near Cincinnati, a longer haul than plaintiff had previously been making. To compensate for the additional distance, the cooperatives agreed to allow Howell to commingle the members' milk, since they were going to the same destination, and, in addition, Howell would be paid an additional nickel per hundred weight of milk.

Howell initially agreed to the arrangement on a trial basis, since he was unsure whether the additional price he would receive together with savings from commingling would offset the additional expense. Approximately a year and a half later, in November, 1973, Howell entered into a written agreement with the defendant cooperatives, formally effectuating this arrangement, which was renewable annually. During this period, and thereafter in 1974 and in 1975, Howell told defendants that the savings realized did not cover the increased cost of the arrangement. He sought a higher price, or a return to the original arrangement, but the defendant cooperatives refused to alter the agreed terms. Howell continued to haul the milk, but subsequently filed, in September, 1976, this action against the cooperatives, alleging, *inter alia*, violations of the Sherman Act. That complaint purported to assert violations of Sections 1 and 2 of the Sherman Act, and Sections 3 and 7 of the Clayton Act (15 USC §§ 14 and 18, respectively), as well as a claim for quantum merit. All of those theories, except for the claims under Sections 1 and 2 of the Sherman Act, were abandoned by plaintiff or dismissed by the court prior to or during trial. These appeals only involve the claims under Section 1 and Section 2.

At trial, Howell contended that the two defendant cooperatives had such combined market power in the geographic area in which Howell could haul milk that they could set and maintain the prices paid Howell for hauling their members' milk. He argued that the price set by the cooperatives was at a "predatorily" low level, below the fair and reasonable market level for his services. Howell maintained the combined market power of the cooperatives was such that he was required to

perform those services at the low price if he was to continue hauling milk in that geographic area. Under this rationale, he claimed a violation of Section 1 of the Sherman Act (15 USC § 1) arguing that the cooperatives had agreed between themselves to impose a "predatory" price for Howell's services, thereby constituting an unlawful contract or conspiracy. He also contended that the cooperatives' actions violated Section 2 of the Sherman Act, prohibiting an unlawful monopoly or unlawful use of monopoly power, in that the two cooperatives together represented virtually all of the farmers in the area. Under these circumstances, Howell maintained, he was required to accept the unreasonably low or "predatory" price or suffer grievous economic consequences.

The defendant cooperatives relied at trial primarily on the Capper-Volstead exemption to the Sherman Act, 7 USC § 291, which provides that producers of agricultural products may act together in cooperatives in collectively processing, handling and marketing their products, and that they may make any necessary contracts to effect their purpose.

The trial court stated during trial that it would direct a verdict for the cooperatives on the issue of conspiracy, since the plaintiff's case was "complete" whether there were one or two contracts and because it found no evidence that the two cooperatives illegally conspired. On this appeal, Howell contends that this was error. The cooperatives claim that although the trial court stated that it would not charge the jury on the issue of conspiracy, it in fact erroneously did so in its instructions to the jury.

On April 24, 1981, the jury returned a verdict for plaintiff Howell in the amount of $136,000 for "lost profits." In this action, the defendant cooperatives appeal the district court's failure to direct a verdict in their favor on the basis of the claimed Capper-Volstead exemption to the monopoly and conspiracy claims. Plaintiff Howell appeals the decision to direct a verdict on the issue of conspiracy.

The Capper-Volstead exemption to antitrust liability provides:

> Persons engaged in the production of agricultural products . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products or persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes.

7 USC § 291. This exemption was discussed by the Supreme Court in *Maryland & Virginia Milk Producers Association* v. *United States*, 362 U.S. 458, 465-67 (1960). The Court there stated that the language of the Capper-Volstead exemption showed no more than a purpose to allow farmers to act together in cooperatives without such actions being held illegal combinations in restraint of trade. Under the exemption, such entities cannot be restrained from lawfully carrying out their legitimate objectives. The Court cautioned, however, that Capper-Volstead does not give cooperatives "full freedom to engage in predatory trade practices at will." In particular, the Act did not leave cooperatives free to engage in unlawful practices against other persons in order to monopolize trade or to restrain or suppress competition with the cooperative. 362 U.S. at 365-67. In *Milk Producers*, the defendant cooperatives engaged in illegal monopolization by compelling dealers to purchase milk from them. In addition, they conspired to eliminate competition from other cooperatives. The Supreme Court stated that while it was permissible for a cooperative to act to advance its processing and marketing business, it was not permissible for it to seek to eliminate competitors.

In a subsequent decision, *Sunkist Growers, Inc.* v. *Winkler & Smith Co.*, 370 U.S. 19, 28 (1962), the Court stated that the 12,000 growers involved in that case could have ultimately joined together in one organization for the collective processing and marketing of their fruit products. The language of the Capper-Volstead Act, the Court stated, specifically permits

concerted efforts by farmers "in the processing, preparing for market, and marketing of their products." 370 U.S. at 28.

This Court discussed the Capper-Volstead exemption in *United States* v. *Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). In *Dairymen*, the defendant cooperative was accused of forcing milk producers to execute full supply and committed supply contracts to eliminate competitors in violation of Section 3 of the Clayton Act. In order to secure those agreements, the cooperative threatened to withhold milk from several processors. The cooperative claimed the Capper-Volstead Act as a defense.

The Court in *Dairymen* stated:

> The Capper-Volstead Act was intended to permit agricultural producers to join together to process, prepare and market agricultural products without fear of prosecution under the antitrust laws. It permits an agricultural cooperative to be formed solely to fix the prices at which its members['] products are sold. . . . Two or more cooperatives can voluntarily join together solely for the purpose of setting uniform prices for their members. . . . As a result, an agricultural cooperative can willfully attain a monopoly through the voluntary combination with other cooperatives. The mere accretion of monopoly power through voluntary combination is immunized by the Capper-Volstead Act.

660 F.2d at 194 (citations omitted) (footnotes omitted). The Court emphasized that the most important inquiry in that case was whether the actions of the cooperatives were intended to stifle competition or were intended to meet legitimate business purposes. 660 F.2d at 194-195.

Another recent decision by this Court discusses the meaning of the term "predatory pricing," of which plaintiff Howell accuses the defendant cooperatives in the case at bar. In *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982), the plaintiff and the defendant were engaged in a concrete "price war"; both sold concrete at a price below their

average total cost. The plaintiff accused the defendant of "predatory pricing." The Court stated:

> Pricing is predatory when a company foregoes short-term profits in order to develop a market position such that the company can later raise prices and recoup profits. . . . Predatory pricing differs from healthy competitive pricing in this motive: "a predator by his pricing practices seeks 'to impose losses on other firms not garner gains for itself.' "

691 F.2d at 823.

It is clear in the light of this authority that the defendant cooperatives in this case have not engaged in the type of anticompetitive conduct or abuse of monopoly power that remains prohibited in light of the Capper-Volstead exemption. Rather, the evidence indicates that the only factor "coercing" Howell into accepting the price proposed by the cooperatives was the fact that the cooperatives, between them, had some 80% to 85% of the dairy farmers in that area as members. This near monopoly status is precisely what the Capper-Volstead Act makes lawful, and it would not be unlawful even if defendants controlled 100% of the farmers. The evidence does not suggest that the cooperatives sought to expand their monopoly power by setting the price of milk hauling or eliminating competition among haulers; the cooperatives themselves did not engage in milk hauling and evidenced no intention of doing so. They simply obtained an advantageous price of hauling for the benefit of their members and the cooperatives were free if they wished to award a hauling contract to another milk hauler. Howell was not "required" to accept the proposed price, and they pursued actions made lawful under the Capper-Volstead Act.

Furthermore, if Howell was persuaded that the price he had initially agreed upon on a trial basis was too low to effect a profit, he could have refused to sign the written agreement unless the price was raised, or have refused to extend the contract from year to year. Howell apparently made a bad bargain and seeks to utilize the antitrust laws to rectify this unfortunate situation.

Decisions by other courts support our conclusion. The Capper-Volstead Act was reviewed at length in *Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980). In *Fairdale Farms*, the plaintiff was both a producer and a dealer-processor of milk. The defendant was a milk producers cooperative. The Second Circuit examined in detail the history, both legislative and otherwise, of the Capper-Volstead exemption. It found that Congress intended the Capper-Volstead Act to be interpreted broadly to aid farmers in marketing their products. This was exemplified by the broad range of activities in which a cooperative might engage, *i.e.*, "processing, preparing for market, handling, and marketing." 635 F.2d at 1040-44. The court found that the only limitation on a cooperative was that it may neither acquire nor exercise monopoly power by using predatory or anticompetitive practices such as picketing and harassment, coerced membership and discriminatory pricing. The court observed that a cooperative may not use its legitimately acquired monopoly power in such a manner as to stifle or smother competition. 635 F.2d at 1044. The court noted further that it is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association. 635 F.2d at 1045. Here defendants were effectuating legitimate objectives by obtaining an apparently advantageous hauling arrangement.

Other courts have held that milk hauling is encompassed within the activities enumerated in the Capper-Volstead Act. In *Green* v. *Associated Milk Producers, Inc.*, 692 F.2d 1153 (8th Cir. 1982), the court held that the word "handling" in the Capper-Volstead Act included milk hauling. The court noted that it is central to the functions of a dairy cooperative to insure that transportation of the milk takes place properly. *See also Treasure Valley Potato Bargaining Association* v. *Ore-Ida Foods, Inc.*, 495 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974) (court found that the term "marketing" included transporting the product).

This court's discussion of activities by a cooperative that remain prohibited under Capper-Volstead in *United States* v. *Dairymen, Inc., supra,* was noted with approval in *Alexander* v. *National Farmers Organization,* 687 F.2d 1173, 1183 (8th Cir. 1982). The Eighth Circuit observed that an agricultural cooperative may lawfully form the intent to monopolize; the impermissible aim is "to pur ue monopoly power by eliminating or restraining competition with the co-op through predatory or anti-competitive practices." 687 F.2d at 1183. *See also GVF Cannery, Inc.* v. *Calif. Tomato Growers Association,* 511 F.Supp. 711, 715 (N.D.Calif. 1981); *Kinnett Dairies, Inc.* v. *Dairymen, Inc.,* 512 F.Supp. 608, 632-33 (M.D.Ga. 1981), *appeal docketed,* No. 81-7308 (11th Cir.) (heard November 1, 1982, no opinion issued yet).

Therefore, it appears that the conduct in which the defendant cooperatives in the present case have engaged remains protected under the Capper-Volstead Act. Proposing a price to plaintiff Howell, even if unreasonably low, is simply not the type of predatory or anticompetitive behavior that courts have found forbidden to dairy cooperatives. Plaintiff Howell was not coerced into accepting the low price to eliminate or restrain competition, and the Capper-Volstead Act protects cooperatives that lawfully acquire and use their monopoly power.

In addition, the transcript of the proceedings below indicates that the trial court did not direct a verdict in favor of the defendant cooperatives on the issue of conspiracy, in violation of Section 1 of the Sherman Act; the trial judge in fact instructed the jury on conspiracy and Section 1 of the Sherman Act.[1] Therefore, the judgment of the district court is RE-

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[1] The Capper-Volstead exemption applies to Section 1 as well as Section 2 of the Sherman Act. *See GVF Cannery, Inc.* v. *California Tomato Growers Association, Inc.,* 511 F.Supp. 711, 714 (N.D.Cal. 1981).

VERSED and REMANDED with directions to dismiss the cause of action against the defendant cooperatives as to Sections 1 and 2 of the Sherman Act.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
/s/ By Gary McCarthy
Deputy Clerk
ISSUED AS MANDATE: October 12, 1983
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-76-460

L. & L. HOWELL, INC.,

Plaintiff

v.

CINCINNATI COOPERATIVE MILK
SALES ASSOCIATION, INC., *et al.*,

Defendants

FILED
JOHN D. LYTER, CLERK
JUL 10 10:33 AM '81

ORDER DENYING DEFENDANT MOTIONS FOR A NEW TRIAL AND FOR JUDGMENT NON OBSTANTE VERDICTO

This matter is before the Court on defendants' joint motions for a new trial (Doc. No. 70) which asserts the following grounds: "(1) The judgment is not sustained by the weight of the evidence; (2) There are excessive damages appearing to have been given under the influence of passion or prejudice; and (3) For good cause and as otherwise contained in affidavits and memorandum attached and as otherwise on oral argument."

This matter was tried from April 20th to April 24th, 1981. It was submitted to a jury and a verdict in favor of the plaintiff in the amount of $136,000 was returned. On May 20, 1981 and pursuant to 15 U.S.C. § 15, the Court issued an order trebling such damages for a total award of $408,000 (Doc. No. 68). Plaintiff's motion for determination and award of attorney fees filed June 22, 1981 (Doc. No. 72) pends before the Court awaiting response by defendants.

This case deals essentially with the relationship between plaintiff, a hauler of milk, and defendants, cooperatives in the Southwestern Ohio area whose members produce milk which was hauled by plaintiff to central locations.

A distinction must be drawn in considering a motion of this sort between the determination that the jury made and the determinations that were available for them to make. The Court has reviewed the testimony in this matter and the instructions given to the jury. It is the Court's opinion that the results reached were sustained by the weight of the evidence and that there were no excessive damages given under the influence of passion or prejudice.

The essential question for consideration, however, is whether or not as a matter of law the jury could have returned any verdict in favor of the plaintiff. In that sense, defendants' motion is essentially a motion for judgment *non obstante verdicto*.

The standard in this Circuit for such a motion may be found in *Sawyer* v. *Methodist Hospital*, 522 F.2d 1102 (6th Cir. 1975). The *Sawyer* case imposes a difficult standard for the motioner to meet. In order to grant a motion for directed verdict, district court is required to "look at all the evidence, take as true the evidence for the plaintiff, disregard all counterveiling evidence, to take the strongest legitimate view of the evidence for the plaintiff, to allow all reasonable inferences from it in his favor and if there is . . . any doubt as to the conclusion to be drawn from the whole evidence, the motion for a directed verdict must be denied." In the case of *Woodruff* v. *Tomlin*, 616 F.2d 924 (6th Cir. 1980), the United States Court of Appeals for the Sixth Circuit held that the standard for directed verdict is likewise applicable to a motion for judgment *non obstante verdicto*.

The question that confronts the Court is whether or not the conduct of the defendants could constitute "predatory con-

duct" as a matter of law. "Predatory conduct" has been defined as follows:

> "There must be something odd, something jarring or unnatural seeming about it. It will not strike the informed observer as normal business conduct, as honestly industrial." *Sullivan: Antitrust Law*, 108, 111-112 (1979).[1]

In the trial of this matter, there was testimony presented on behalf of the plaintiff that the contract price for the hauling of milk imposed by defendants was so low as to be below the fair and reasonable market price thereof. There was evidence presented by the defendants that the price was not unreasonably low and that the plaintiff had the option to terminate the contract at any time. A factual determination was thus presented to the jury and its decision is supported by ample evidence.

It is undisputed that defendants controlled, through the cooperative, approximately 80% of the milk produced in the hauling area.

It strikes this Court that the power inherent in controlling the delivery of 80% of milk produced is in the nature of a monopoly power and if such power is used to force a supplier to provide services below a fair and reasonable market price, such a practice would not qualify as a "normal business conduct, as honestly industrial."

Defendants assert that by reason of their existence as a cooperative, they are protected by the *Capper-Volstead Act*, 7 U.S.C. § 291. The terms of *Capper-Volstead* do apply to defendants but it does not create a sanctuary from which defendants may engage in predatory activities at will.

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[1] Professor Sullivan's definition of predatory conduct will be accepted by this Court particularly in view of the fact that both plaintiff and defendants have quoted his definition. Plaintiff refers to it on page 2 of its Memorandum filed May 11, 1981 (Doc. No. 66) and defendants refer to it at page 3 of the Memorandum in Support of a Motion for New Trial filed May 29, 1981 (Doc. No. 70).

This is the question of law. The question of fact is whether or not the jury, after appropriate instruction, could find that the defendants did engage in predatory practices and if so, to award damages therefor.[2]

Upon consideration of the evidence presented and the memoranda filed, the Court is of the opinion that the injuries asserted by plaintiff do come within the definition utilized by the Supreme Court of the United States in *Brunswick Corp.* v. *Pueblo Bowl-o-matic, Inc.*, 429 U.S. 477 (1977). In that opinion, the following definition was given:

> "Injury of the type the antitrust laws were intended to prevent and that flow from that which makes defendant's acts unlawful. The injury should reflect the anti-competitive effect either of the violation or the anti-competitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations would be likely to cause.' " Citing *Zenith Radio Corp.* v. *Hazeltime Research*, 395 U.S. at 125.

Based upon this determination it must follow that a jury, properly instructed, could find in favor of the plaintiff based upon the evidence presented.

Defendants joint motion for new trial or for judgment *non obstante verdicto* is hereby DENIED.

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN, Chief Judge
United States District Court

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[2] In support of the motion for a new trial, defendants filed an 11-page memorandum divided into four sections including 10 subsections. Not one of such sections was devoted to any asserted error in the instructions given by the Court.

United States District Court

FOR THE
SOUTHERN DISTRICT OF OHIO-WESTERN DIV.

CIVIL ACTION FILE NO. C-1-76-460

L. & L. HOWELL, INC.

Plaintiff,

v.

CINCINNATI COOPERATIVE MILK SALES ASSOC., INC., *ET AL.*,

Defendants.

JUDGMENT

JUDGMENT ON DECISION BY THE COURT

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the Court hereby renders judgment for the plaintiff, L & L Howell, Inc. in the total amount of four hundred eight thousand dollars ($408,000.00). Said total amount is treble total damages sustained by plaintiff as found by jury verdict dated April 24, 1981.

Defendants pending motions remain under submission as does the determination of reasonable attorney fees.

Dated at Cincinnati, Ohio, this 20th day of May, 1981.

Filed
John D. Lyter, Clerk
May 20 11:05 AM '81

John D. Lyter
JOHN D. LYTER
Clerk of Court

Anne Catanzaro
Deputy Clerk

United States District Court

FOR THE
Southern District of Ohio, Western Div.

C-1-76-460

L. & L. HOWELL, INC.

Plaintiff,

v.

CINCINNATI COOPERATIVE MILK
PRODUCERS ASSOCIATION, INC.

Defendants.

Filed
John D. Lyter, Clerk
APR. 24 4:27 PM '81

We, the Jury, unanimously find the issues herein in favor of the plaintiff and award damages as follows:

Loss of Past Profits:
$136,000.00
Loss of Good Will: $ 0
TOTAL: $136,000.00

April 24, 1981

/s/ Charles W. Thuring
(Foreman)

INTERROGATORIES

FILED
JOHN D. LYTER, CLERK
APR 24 4:28 PM '81

Question One:

Do you unanimously find that the defendants engaged in predatory practices toward plaintiff as defined in charge 4011.

Yes ✓ No ____

If you answered Question One "yes", you will answer Question Two. If you answered Question One "no", you need not answer any other questions. You will sign Verdict Form 2.

Question Two:

Do you unanimously find that plaintiff was damaged in its business or property by such predatory conduct.

Yes ✓ No ____

If you answered Question Two "yes", you will answer Question Three. If you answered Question Two "no", you need not answer any other questions. You will sign Verdict Form 2.

Question Three:

Do you unanimously find that, in accordance with charge 4801 the conduct of defendant was the proximate cause of plaintiff's damage.

Yes ✓ No ____

If you answered Question Three "yes", you will determine the amount of plaintiff's damages in accordance with charge 4801 entitled "Determination of Damages"; 4802 entitled "Amount of Damages"; 4803 entitled "Mitigation of Damages" and 5034 entitled "Damages-No Implication" and fill out Ver-

dict Form 1. If you answered Question Three "no", you will use Verdict Form 2.

/s/ Charles W. Thuring
/s/ Robert Woods
/s/ Margret H. Brenneman
/s/ Walter Sillen
/s/ Robert G. Pelphry
/s/ Robert M. Gilkey

United States District Court

FOR THE
SOUTHERN DISTRICT OF OHIO-WESTERN DIV.

CIVIL ACTION FILE NO. C-1-76-460

L. & L. HOWELL, INC.,

Plaintiff,

v.

CINCINNATI COOPERATIVE MILK SALES ASSOCIATION, INC., *et al.*,

Defendants.

FILED
JOHN D. LYTER, CLERK
JUL 10 2:48 PM '81

JUDGMENT

JUDGMENT ON DECISION BY THE COURT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant's motion for new trial and for judgment non obstante verdicto should be and is hereby DENIED.

Dated at Cincinnati, Ohio, this 10th day of July, 1981.

John D. Lyter
Clerk of Court

/s/ Anne Catanzaro
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 81-3491/92

L & L HOWELL, INC.
Plaintiff-Appellee,

v.

CINCINNATI COOPERATIVE MILK
SALES ASSOCIATION, INC., *et al.*,
Defendant-Appellants.

FILED
OCT 4 1983
JOHN P. HEHMAN, Clerk

ORDER

Before: JONES and WELLFORD, Circuit Judges; ALLEN, District Judge.*

No judge of the court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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*Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

Clayton Act, § 4, 15 U.S.C. § 15, Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sherman Act, § 1, 15 U.S.C. § 1, July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, that nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any com-

modity herein involved, between manufacturers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sherman Act, § 1, 15 U.S.C. § 1, as amended Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, § 2, 89 Stat. 801.

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, § 2, 15 U.S.C. § 2, July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sherman Act, § 2, 15 U.S.C. § 2, as amended Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708.

§ 2. Monopolizing trade a felony; penalty

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MMI MEMBERSHIP

PIPELINE

AUGUST 26, 1983

* * *

HOWELL CASE VERDICT REVERSED

L & L Howell Inc., hauling milk in the Dayton and Cincinnati areas, sued MMI's predecessor co-ops Miami Valley and Cincinnati Milk Sales on allegations of unreasonably low rates for services performed, and claimed damages under the anti-trust laws.

A verdict in federal district court in Howell's favor was rendered in 1981.

The 6th Circuit Federal Court of Appeals recently reversed this decision. The opinion stated the producers and their cooperative associations have the right to make as favorable terms as they can for hauling services.

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